THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Edited by members of the Department of Law of the University of Pennsylvania under the supervision of the Faculty, and published monthly for the Department by ROBERT E. ANDERSON, Business Manager, at S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the BUSINESS MANAGER.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE REPORTS.

BANKRUPTCY.

Liquor License:

In *Snyder* v. *Bougher*, 214 Pa. 453, the Supreme Court of Pennsylvania decides that while a retail liquor license may not be sold by a trustee in bankruptcy, yet the furniture and fixtures of a licensed saloon together with the unexpired lease thereof may be sold by the trustee on condition that the license shall be transferred to

BANKRUPTCY (Continued).

the purchaser by the license court. If the purchaser abandons his purchase without any attempt to secure a transfer of the license, he will be liable for a loss on a resale. Compare *Blumenthal's Petition,* 125 Pa. 412.

BANKS AND BANKING.

The Supreme Court of Oregon holds in *State* v. *Miller,* 85 Pac. 81, that where an agent of a bank certifies a check which he issues, whereby the funds of the bank may be withdrawn for his benefit, the person receiving the check, in order to give it validity, is bound to make inquiry from other officers of the bank in respect to its validity. Compare *Wendel* v. *Boyd,* 91 N. W. 860.

Checks: Circulation

BILLS AND NOTES.

In *City Deposit Bank, &c.* v. *Green,* 106 N. W. 942, the Supreme Court of Iowa decides that a bank discounting negotiable paper for a depositor, giving him credit therefor on its books for the proceeds, is not a bona fide holder, unless some other consideration passes, for such transaction simply creates the relation of debtor and creditor, and, so long as the deposit is not drawn, the bank is not an innocent holder, though it took the paper before maturity and without notice. Compare *Grover's Bank* v. *Blue,* 110 Mich. 31.

Bona Fide Holder

BREACH OF MARRIAGE PROMISE.

In *Wrynn* v. *Downey,* 63 Atl. 401, the Supreme Court of Rhode Island decides that in an action for breach of promise of marriage, evidence that defendant seduced plaintiff is not admissible in aggravation of damages. This ruling, which is apparently not in line with the general trend of authority, is made after a careful review of the decisions. Compare *Fidler* v. *McKinley,* 21 Ill. 316.

CARRIERS.

The United States Circuit Court, W. D, Pennsylvania, decides in *Olanta Coal Min. Co.* v. *Beech Creek R. Co.*, 144 Fed. 150, that a railroad company cannot refuse to accept and transport coal tendered by a shipper, on the ground that it is of inferior quality to other coal also produced on its line, and that the marketing of such coal will injuriously affect the sale and consequently the shipment of the superior quality. See in connection with this decision the note to *Harp* v. *Choctaw, &c. R. R. Co.*, 61 C. C. A. 414.

Duty to Accept Shipments

In *Missouri Pac. Ry. Co.* v. *Peru-Vanzandt, &c. Co.*, 85 Pac. 408, the Supreme Court of Kansas decides that when a common carrier negligently delays the delivery of goods, so that the damages occasioned by such delay exceed the amount of freight due for the transportation of such goods, the consignee may rightfully demand the delivery of the goods without payment of freight, and a refusal by the carrier to surrender possession upon such demand is wrongful and amounts to a conversion.

Delay in Shipment

CHARITIES.

In *Nichols* v. *Newark Hospital* 63 Atl. 621, the Court of Chancery of New Jersey decides that where a devise is made to a hospital, the charter of which provides that no regulation of its directors shall allow any preference to patients on account of difference in religious faith, or on account of birthplace or parentage of the parties, and the devise is to be paid to another hospital under the doctrine of cy pres, the designated hospital must be in a position to comply with this proviso.

Administration: Cy Pres.

CONSTITUTIONAL LAW.

In *People of the State of New York, &c.* v. *Nathan L.*

CONSTITUTIONAL LAW (Continued).

Due Process of Law: Taxation

Miller, &c., 26 S. C. R. 714, the United States Supreme Court decides that a domestic railway corporation is not deprived of its property without due process of law because no reduction is allowed from the capital stock, taken as the basis of the franchise tax imposed by statute, on account of the considerable portion of its rolling stock which, by the familiar course of railway business, is always absent from the state. Compare the very recent case of *Ayer & L. Tie Co.* v. *Kentucky*, 202 U. S. 403, 26 S. C. R. 679.

Race Distinction: Reasonableness

The Supreme Court of Florida decides in *Petterson* v. *Taylor*, 40 S. 493, that a passenger on a street car has no right to any particular seat in such car, nor to a seat in any particular end of such car, and a regulation of a street car company, acting under the provisions of a city ordinance designed to effect a separation of the races on such cars, by which the seats in the rear end of its cars are assigned to the use of passengers of the colored race and the seats in the front end of such cars to passengers of the white race, or vice versa, is not an unreasonable regulation, nor an unlawful discrimination between the races. See also the decision of the same court immediately following in *Crooms* v. *Schad*, 40 S. 497.

Sale of Tickets

In *Ex parte Quarg*, 84 Pac. 766, the Supreme Court of California takes a somewhat different view with regard to ticket brokerage from that held by several recent decisions, and holds that an act prohibiting any person from selling tickets to theatres or other public places of amusement for a price higher than that originally charged by the management of such amusement places is void as infringing on the right of property guaranteed by the Constitution. The ground of the decision is said to be that the enactment is not a valid exercise of the police power of the state as it prohibits an act which is innocent in character and which has no tendency to affect, injure, or endanger the public health, morals or safety.

CONSTITUTIONAL LAW (Continued).

Food: Sale of Butter

The same court decides in *Ex parte Dietrich,* 84 Pac. 770, that an act requiring packages of butter between one-half and six pounds in weight offered for sale to have their exact weight marked thereon in letters or figures not less than one-fourth of an inch in height, is not a valid exercise of the police power, but is unconstitutional and void as being a restriction on the constitutional right to property and privilege of following a legitimate business. Compare *Ex parte Whitwell,* 98 Cal. 73, 19 L. R. A. 727.

CONTEMPT.

Attorneys: Misconduct in Argument

In re Chartz, 85 Pac. 352, it appeared that the defendant, an attorney of the Supreme Court, in a petition for rehearing of a cause in which the Supreme Court had held a statute limiting the hours of labor constitutional, stated that in his opinion the decisions favoring the power of the state to limit the hours of labor on the ground of the police power of the state were all wrong, were written by men who have never performed manual labor, and by politicians and for politics, and that they did not know what they wrote about. Under these facts the Supreme Court of Nevada decides that such statement constituted a contempt of the Supreme Court, which was not purged by defendant's disavowal of any intent to commit a contempt and by his apology. The case is very carefully considered. Compare *In re Terry,* 36 Fed. 419.

CONTRACTS.

Recovery of Payments

The United States Circuit Court of Appeals, Sixth Circuit, decides in *Michigan Yacht & Power Co.* v. *Busch,* 144 Fed. 929, that a party to a contract which he has himself failed to carry out may under the common counts recover money paid by him in part performance to the extent that his payment was beneficial to the other party and in excess of the damages sustained by reason of the breach.

CONTRACTS (Continued).

Validity: Unlawful Consideration

In *State* v. *Wilson,* 84 Pac. 737, the Supreme Court of Kansas decides that a note and mortgage given for a consideration, a part of which is unlawful because based upon a transaction made criminal by the statute, are wholly void. It is further held in the same case that where two notes secured by a mortgage are given for a consideration in part unlawful, although the unlawful portion of the consideration is less than either of the notes, both notes and mortgage are wholly void. See, however, in connection herewith *Rathbone* v. *Boyd,* 30 Kan. 485.

COURTS.

Federal Courts: Jurisdiction

The United States Circuit Court of Appeals, Fifth Circuit, decides in *Louisville & N. R. Co.* v. *Bitterman,* 144 Fed. 34, that in a suit by a carrier to restrain the scalping of nontransferable round trip tickets issued at a reduced fare on account of gatherings expected to be largely attended from various parts of the country, the value of the business so sought to be protected determines the amount in controversy for the purpose of determining the jurisdiction of the federal court. See in connection herewith notes to *Auer* v. *Lombard,* 19 C. C. A. 75, and to *Tennent-Stribling Shoe Co.* v. *Roper,* 36 C. C. A. 459.

Appeal Courts: Advisory Opinions

An interesting holding appears in *In re Opinion of the Justices,* 77 N. E. 820, where the Supreme Judicial Court of Massachusetts decides that the object of the constitutional provision requiring the Justices of the Supreme Judicial Court to give opinions to the executive and legislative branches of the government, is to enable these departments to have such assistance as may come from the opinions in the performance of their official duties in regard to matters then pending, and the Justices will decline to answer a question asked merely to obtain general information without reference to a pending matter. Compare *Opinion of the Justices,* 186 Mass. 608.

CRIMINAL LAW.

Murder: Insanity

An important principle with respect to evidence of insanity is laid down by the Pennsylvania Common Pleas Court of Dauphin County in *Commonwealth v. Brubaker,* 32 C. C. R. 344, where it is held that evidence of insanity of those who are of the same ancestry as the defendant is admissible in aid of the defence of insanity, but when the insanity offered to be shown is in those who are not only of the ancestry of the defendant but of other ancestry as well, it is too remote and uncertain to found upon it an inference of insanity in the defendant's ancestry.

DEEDS.

Fraud: Failure of Consideration.

In *Jennings* v. *Jennings,* 85 Pac. 65, the Supreme Court of Oregon decides that where a wife, while estranged from her husband and in love with another, induced the husband to convey property to her on her representation that if he did so she would resume marital relations with him, which she had no intention of doing, and, on the execution of the deed, refused to keep her promise and abandoned her husband, with the purpose of continuing her unlawful relations with her paramour, the husband was entitled to a decree cancelling the deed. Compare *Dickerson* v. *Dickerson,* 24 Neb. 530.

EVIDENCE.

Declarations: Corporate Officers

The Supreme Court of South Carolina holds in *Marshall* v. *Columbia, &c. Co.,* 53 S. E. 417, that in an action against a corporation to perpetually enjoin the use of a certain easement for private purposes, admission of declarations of the president of the corporation on the purchase of a lot as to an adjoining easement is not error.

EVIDENCE (Continued).

Lost Telegrams

In *Young* v. *People,* 77 N. E. 536, the Supreme Court of Illinois decides that the best evidence of the contents of a telegram claimed to have been lost or destroyed is the original telegram filed with the telegraph company at the place from which it was sent, and not the copy retained by the company in its office to which the message is sent. Compare *Morgan* v. *People,* 59 Ill. 58.

FALSE IMPRISONMENT.

Void Ordinance

In *Bohri* v. *Barnett,* 144 Fed. 389, the United States Circuit Court of Appeals, Seventh Circuit, decides that an action for false imprisonment based on the arrest, conviction and imprisonment of plaintiff for violation of an invalid city ordinance will not lie against the magistrate who tried the cause, the city attorney who prosecuted, the constable who made the arrest or the person who filed the complaint, where all acted in good faith without malice and in the belief that the ordinance was valid, and the proceedings were regular and the magistrate had jurisdiction of all prosecutions for violations of the city ordinances, which necessarily included jurisdiction to determine the validity of the ordinance. See also *Bradley* v. *Fisher,* 13 Wall. 35.

HUSBAND AND WIFE.

Covenants: General Warranty

In *George* v. *Brandon,* 214 Pa. 623, the Supreme Court of Pennsylvania decides that where a wife joins in a general warranty deed with her husband, for land belonging to the husband, for the purpose of conveying her right of dower, she is bound by the covenant of general warranty, and she cannot acquire title to the land in proceedings on a mortgage which was a lien on it at the date of the deed, so as to set up such title against the grantee in the deed. See also *Hunter* v. *Baxter,* 210 Pa. 72.

HUSBAND AND WIFE (Continued).

The question as to whether a married woman may sue for the alienation of the affections of her husband, which has been answered in different ways by different courts, is raised in the recent Massachusetts case of *Nolin* v. *Pearson*, 77 N. E. 890, where the Supreme Judicial Court of that State decides that under the statutes removing from married women the disability of coverture, and enabling them to sue in the same manner as if sole, a married woman may, in her own name, maintain an action for damages for enticing away and alienating the affections of her husband. The authorities in point are collected and cited in the decision, and the court reaches the conclusion which under modern conditions is obviously fair.

Alienation of Affection

INTERSTATE COMMERCE.

In *Franklin McNeill &c.* v. *Southern Railway Co.*, 26 *S. C. R.* 722, the United States Supreme Court decides that an order of a state corporation commission compelling a railway company engaged in interstate commerce to deliver cars containing interstate shipments beyond its right of way to a private siding is an unlawful interference with interstate commerce, whether viewed as an assertion by the commission of its general powers over carriers, or of its power to make the order in a particular case in favor of a given person or corporation. Compare *Central Stock-yards Co.* v. *Louisville & N. R. Co.*, 118 Fed. 113, 63 L. R. A. 213.

State Regulation

JUDGMENT.

In *Ebersole* v. *Daniel*, 40 Southern 614, the Supreme Court of Alabama decides that where defendant, being indebted to plaintiff on an account, gave a note for part of the amount due, the cause of action accruing at the maturity of the note was not the same as the cause of action for the amount still due on the account, and the recovery of judgment on the note did not bar a suit for the balance of the account, on the ground that the bringing of the action

Res Judicata

JUDGMENT (Continued).

on the note was a splitting of the cause of action. Compare herewith *Oliver* v. *Holt,* 11 Ala. 574.

LARCENY.

In *Maxwell* v. *Territory,* 85 Pac. 116, the Supreme Court of Arizona decides that one who has taken an estray and is in possession thereof has such property interest therein that the taking of it from him may be larceny; so also one in possession of stolen property purchased from the thief; so also even a thief, in possession of property he has stolen, as against another than the owner.

Property Interest

LIFE ESTATE.

The Supreme Court of Iowa holds in *First Congregational Church &c.* v. *Terry,* 107 N. W. 305, that a life tenant, being charged with the duty of paying the taxes accruing on the property, cannot destroy the estate of the remainder by permitting it to be sold for taxes and take to himself the tax title, either directly or by a conveyance from a third person who has acquired it. Compare *Defreese* v. *Lake,* 109 Mich. 415, 32 L. R. A. 744.

Tax Titles

MASTER AND SERVANT.

The Supreme Court of Utah decides in *Tuckett* v. *American Steam & Hand Laundry,* 84 Pac. 500, that it is not necessary for an employe suing for injuries received in consequence of defective machinery to prove the precise defect. Compare *Mangum* v. *Bullion Min. Co.,* 15 Utah 534.

Defective Machinery: Proof

MORTGAGES.

The Pennsylvania Supreme Court decides in *Meigs* v. *Tunnicliffe,* 214 Pa. 495, that where a mortgagee after a conveyance of the mortgaged premises by the mortgagor, releases from the lien a portion of the premises without the knowledge or consent of the mortgagor,

Partial Release

MORTGAGES (Continued).

the latter is released from any loss to the mortgagee resulting from a deficiency in the proceeds of a subsequent sale in foreclosure proceedings. In such a case it is immaterial that the deed of the mortgagor of which the mortgagee had no knowledge, was not made subject to the mortgage, and contained a covenant against incumbrances. Compare *Schrack* v. *Shriner,* 100 Pa. 451.

MARRIAGE.

In *Willits* v. *Willits,* 107 N. W. 379, the Supreme Court of Nebraska decides that a court annulling a marriage at the suit of a husband, who was under the age of consent when the marriage was solemnized, may require him to pay a reasonable amount for the support and nurture of the issue of such marriage. The case seems to be one of novel impression, but the decision reached is undoubtedly in accord with justice.

Infancy of Party

MUNICIPALITIES.

In *Scranton Gas & Water Co.* v. *Scranton City,* 214 Pa. 586, the Supreme Court of Pennsylvania, laying down the general principle that the easement which a gas or water company has in the streets of a municipality is subject to the superior right of the public both in the surface and the soil beneath the surface, decides further under this principle that where a city changes the grade of a street in order to do away with a railroad grade crossing, and a gas and water company is obliged to move its pipes from the street by reason of the change of grade, the company can recover no damages from the city for the injuries sustained. See in this connection *Water Commissioners of Jersey City* v. *Hudson City,* 13 N. J. Eq. 420.

Streets: Gas and Water Companies

RAILROADS.

An important decision is rendered by one of the Common

RAILROADS (Continued).

Street Railways: Crossings

Pleas Courts of Pennsylvania in *Cumberland Valley, &c.* v. *The Chambersburg, &c. Ry. Co.*, 32 Pa. Co. Ct. Reps. 291, where it is decided that a railroad company which does not own the fee in its right of way cannot prevent a street railway company from building an overhead crossing twenty-two feet high at a point where the street railway company has acquired from the land owners the right to construct its railway. See *R. R. Co.* v. *Glenwood Ry. Co.*, 184 Pa. 227.

Injury to Person on Train

In *Grahn* v. *International & G. N. R. Co.*, 93 S. W. 104, the Supreme Court of Texas decides that where the conductor of a freight train collusively agreed to carry a person without requiring payment of fare, the company was not liable for injuries caused by the conductor's forcing him to leave the train while in motion. Compare *Yazoo, &c. R. R. Co.* v. *Anderson*, 25 Southern, 865.

SCHOOLS.

Sectarian Influence

The Court of Appeals of New York has affirmed the decision of the Appellate Division of the Supreme Court with respect to the wearing of a religious garb in the public schools. At the time of the decision of the Lower Court we referred to it as an important holding (See AMERICAN LAW REGISTER, vol. 54, p. 382). The present decision of the Court of Appeals appears in *O'Connor* v. *Hendrick*, 77 N. E. 612, where it is held that a regulation of the superintendent of public instruction prohibiting teachers in public schools from wearing a distinctly religious garb while teaching therein is a reasonable and valid exercise of the powers conferred upon him to establish regulations as to the management of public schools, because the influence of such apparel is distinctly sectarian, and the prohibition is in accord with the public policy of the State, as declared in the State Constitution, prohibiting the use of property or credit of the state in the aid of sectarian influence.

SUNDAY.

In *Jacobson* v. *Bentzler,* 107 N. W. 7 it appeared that plaintiff loaned money to defendant on Sunday, executing a check to the defendant for the amount of the loan and receiving a deed to real estate to secure the loan. The deed was executed and delivered on Sunday, but it was not acknowledged and recorded, nor the check presented for payment until a subsequent secular day. Under these facts the Supreme Court of Wisconsin holds that the transaction was complete on Sunday, so as to preclude plaintiff from maintaining an action to recover the loan, the acknowledgment and recording of the deed and collection of the check being mere incidents to the transaction, which, when accomplished, related back to the date of the loan. Compare *Trowert* v. *Decker,* 51 Wis. 26.

Loans: Completion of Transaction

TAXATION.

The Supreme Court of Pennsylvania in passing upon the operation of the collateral inheritance tax law of the State holds in *Hawley's Estate,* 214 Pa. 525, that an agreement to set aside a will and to make distribution in accordance with its provisions will not relieve legacies passing to collaterals from the collateral inheritance tax; but money paid in good faith in compromise of threatened litigation is not subject to the tax. It is further decided in the same case that where certain legatees under a will claim that the provision for their benefit was in discharge of an obligation of the decedent, and the heirs deny the validity of the writing as a will because of the want of testamentary capacity, and the parties without fraud or collusion make a compromise by which the will is set aside and the legatees are allowed a part of their demands, the payment made to the legatees is not subject to the collateral tax. In such a case payments made to other legatees who had no demand against the estate are also relieved from the tax. Compare *Perrer's Estate,* 159 Pa. 508.

Collateral Inheritance Tax

TORTS.

In *Benson* v. *Ross,* 106 N. W. 1120, it appeared that

TORTS (Continued).

Joint Tort Feasors

plaintiff was injured by a stray bullet negligently shot from a rifle, in violation of a city ordinance, by one of the three defendants, who were shooting at a mark, using the rifle by turns. Under these facts the Supreme Court of Michigan decides that the plaintiff was not bound to prove which of the defendants fired the shot, since as there was concert of action all were liable as joint tort feasors. Compare *Jenne* v. *Sutton,* 43 N. J. Law, 257.

TRADE MARKS AND TRADE NAMES.

Innocent use by Another

In *Hygeia Distilled Water Co.* v. *Consolidated Ice Co.,* 144 Fed. 139, the United States Circuit Court, W. D. Pennsylvania, decides that the innocent use of another's trade-mark, without knowledge of its prior appropriation, will not justify its further use after the fact of infringement becomes known; nor is the right to an injunction against such infringement defeated by the length of time of such use unknown to the proprietor, or by the fact that he has not, up to the time of suit, extended his trade to the locality occupied by defendant. Compare *Singer* v. *Wilson,* 3 H. L. C. 376.

Use: Infringement

In *Wagner Typewriter Co.* v. *F. S. Webster Co.,* 144 Fed. 405, it appeared that complainant manufactured and sold typewriter ribbons for the "Underwood" typewriter, the ribbons being contained in boxes bearing the words "Underwood Typewriter Copying Ink Ribbon, manufactured only by J. Underwood & Co.." Defendant also manufactured typewriter ribbons, using a star as a trade-mark and the words "The Webster Star Brand," on its boxes, above which was the single word "Underwood." There was evidence that defendant's use of the word "Underwood" was solely to indicate that the box contained a ribbon of the proper size and on the appropriate spool for use in the Underwood typewriter, and not for the purpose of palming off its ribbons as of "Underwood" manufacture. Under these facts the United States Circuit Court, S. D. New York, decides that defendant's use of the word was not unlawful. Compare *Cortelyou* v. *Johnson,* 138 Fed. 110.